Nos. 14-1418, 14-1458, 14-1505,
15-35, 15-105, 15-119, 15-191

FILED
JAN 11 2
OF THE

IN THE

Supreme Court of the United States

DAVID A. ZUBIK, *et al.*,
Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

[CAPTIONS CONTINUED ON INSIDE COVER]

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS
FOR THE THIRD, FIFTH, TENTH, AND D.C. CIRCUITS

BRIEF OF AMICI CURIAE CHRISTIAN LEGAL SOCIETY, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, AND AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS SUPPORTING PETITIONERS

ROBERT K. SMITH
MICHAEL A. GREENE
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

ELLIOT SHACKELFORD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

KIMBERLEE WOOD COLBY
CHRISTIAN LEGAL SOCIETY
8001 Braddock Rd., Ste. 302
Springfield, VA 22151

MATTHEW T. MARTENS
Counsel of Record
REGINALD J. BROWN
ASHLEY E. BASHUR
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
matthew.martens@
wilmerhale.com

PRIESTS FOR LIFE, *et al.*,
Petitioners,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*,
Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, *et al.*,
Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

SOUTHERN NAZARENE UNIVERSITY, *et al.*,
Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

GENEVA COLLEGE, *et al.*,
Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. THE DECISIONS OF THE CIRCUIT COURTS BELOW CONFLICT WITH THIS COURT'S SUBSTANTIAL BURDEN PRECEDENT 7

A. The Lower Courts Unduly Deferred To HHS's Characterization Of The Relevant Provision As An "Accommodation" 7

B. The Circuit Courts Below Misconstrued The Substantial Burden Test 16

1. The circuit courts impermissibly questioned the reasonableness of Petitioners' religious beliefs 16

2. The circuit courts' analysis improperly focused on the administrative burdens in complying with the accommodation, instead of the significant penalties for refusing to participate in the accommodation scheme in accordance with Petitioners' religious beliefs 20

II. THE CIRCUIT COURTS' FLAWED INTERPRETATION OF RFRA WILL HAVE SWEEPING, DETRIMENTAL CONSEQUENCES FOR RELIGIOUS LIBERTY IF UPHELD 22

TABLE OF CONTENTS—Continued

Page

A. The Lower Courts' Substantial Burden Analysis Would Allow Courts To Override Any Sincerely Held Belief 22

B. The Decisions Below, If Upheld, Could Incentivize Regulators To Utilize "Accommodations" To Avoid RFRA's Requirement That Government Respect Religious Liberty 28

CONCLUSION 33

TABLE OF AUTHORITIES

CASES

Page(s)

Beerheide v. *Suthers*, 286 F.3d 1179 (10th Cir. 2002) 15

Bowen v. *Roy*, 476 U.S. 693 (1986) 13

Burwell v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) ..... *passim*

Church of Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993) 27

Cole v. *Danberg*, No. 10-088-GMS, 2015 WL 5437083 (D. Del. Sept. 14, 2015) 32

Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 31

Employment Division, Department of Human Resources of Oregon v. *Smith*, 494 U.S. 872 (1990) ..... *passim*

Gonzales v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) 27

Hernandez v. *Commissioner*, 490 U.S. 680 (1989) 16, 17

Holt v. *Hobbs*, 135 S. Ct. 853 (2015) 21, 23, 25, 27, 31

Kaemmerling v. *Lappin*, 553 F.3d 669 (D.C. Cir. 2008) 11, 12

LaPlante v. *Massachusetts Department of Corrections*, 89 F Supp. 3d 235 (D. Mass. 2015) 32

Little Sisters of the Poor Home for the Aged v. *Burwell*, 799 F.3d 1315 (10th Cir. 2015) 10, 11

TABLE OF AUTHORITIES—Continued

Page(s)

Lyng v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) 13, 24, 25, 28

Nelson v. *Miller*, 570 F.3d 868 (7th Cir. 2009) 24

Schlemm v. *Wall*, 784 F.3d 362 (7th Cir. 2015) 32

Sharpe Holdings, Inc. v. *U.S. Department of Health & Human Services*, 801 F.3d 927 (8th Cir. 2015) 10, 15, 17

Sherbert v. *Verner*, 374 U.S. 398 (1963) 23

Snodgrass v. *Robinson*, No. 7:14CV00269, 2015 WL 4743986 (W.D. Va. Aug. 10, 2015) 32

Thomas v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981) ..... *passim*

United States v. *Friday*, 525 F.3d 938 (10th Cir. 2008) 15

University of Notre Dame v. *Sibelius*, 743 F.3d 547 (7th Cir. 2014) 19, 20

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 21

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I 3

26 U.S.C.
§ 4980D 8
§ 4980H 8

TABLE OF AUTHORITIES—Continued

Page(s)

42 U.S.C.
§ 300a-7 29
§ 300gg-13 3
§ 2000bb 21, 30
§ 2000bb-1 ..... 3, 31
§ 2000bb-3 15
§ 2000cc-1 31
§ 2000cc-5 23

REGULATIONS

29 C.F.R.
§ 2590.715-2713 8
§ 2590.715-2713A 8, 9

45 C.F.R.
§ 147.130 8
§ 147.131 8

77 Fed. Reg. 8725 (Feb. 15, 2012) 8

78 Fed. Reg. 39,870 (July 2, 2013) 4, 8, 30

79 Fed. Reg. 51,092 (Aug. 27, 2014) 9, 30

80 Fed. Reg. 41,318 (July 14, 2015) 9

OTHER AUTHORITIES

McConnell, Michael W., *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) 29

INTEREST OF THE AMICI CURIAE[1]

The Christian Legal Society (CLS) is a nonprofit, nondenominational association of Christian attorneys, law students, and law professors with members in every state and chapters on 90 law school campuses. CLS's legal advocacy division, the Center for Law and Religious Freedom, works to protect all citizens' right to be free to exercise their religious beliefs. CLS was instrumental in the passage of the Religious Freedom Restoration Act (RFRA) and the subsequent defense of RFRA's constitutionality and proper application in the courts. Because the Health and Human Services (HHS) contraceptive mandate sharply departs from our nation's historic, bipartisan tradition of respecting religious conscience, CLS believes it represents a grave attempt by the government to diminish all Americans' religious liberty. For that reason, CLS filed amicus curiae briefs in these cases in the Third, Tenth, and D.C. Circuits.

The Association of Christian Schools International (ACSI) is a nonprofit, nondenominational, religious association providing support services to 24,000 Christian schools in over 100 countries.

The American Association of Christian Schools (AACS) serves over 800 Christian schools and their students through a network of thirty-eight state affiliate organizations and two international organizations.

---

[1] No counsel for a party authored this brief in whole or in part. Nor did counsel for a party, a party, or anyone other than the amici curiae or their counsel make a monetary contribution intended to fund the preparation or submission of this brief. Letters granting blanket consent from all parties are on file with the Clerk.

The questions presented in this appeal are of substantial importance to amici, who share a commitment to religious liberty, not just for themselves and their respective constituents, but for Americans of all faith traditions. While amici may differ in their views regarding whether the general use of contraceptives is acceptable or whether certain contraceptives act as abortion-inducing drugs, amici agree that the nation's historic, bipartisan commitment to religious liberty requires that the government respect the religious beliefs of those faith traditions whose religious beliefs prohibit participating in the use or provision of contraceptives, including abortion-inducing contraceptives. Amici write in support of Petitioners' position because the HHS contraceptive mandate's so-called "accommodation" fails to respect basic principles of religious liberty.

Beyond the specific issue presented in this case, amici are also gravely concerned about the approach taken by the Third, Fifth, Tenth, and D.C. Circuits to resolving the religious liberty issue presented in these cases. Under the guise of evaluating whether the regulations at issue imposed a substantial burden on Petitioners' exercise of their religious faith, the circuit courts in fact evaluated the religious reasoning that leads Petitioners to believe that the HHS accommodation scheme renders them complicit in the provision of contraceptives in contravention of their faith. The religious reasoning underlying Petitioners' belief is, however, beyond the competence or purview of the courts to review. If left unchecked, the circuit courts' interpretation of RFRA as allowing courts to second-guess religious reasoning and beliefs will have far-reaching and detrimental consequences for religious liberty.

SUMMARY OF ARGUMENT

Religious liberty in our constitutional tradition certainly means that "all persons have the right to believe or strive to believe in a divine creator and a divine law." *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). But religious liberty means much more than that. By their terms, both our Constitution and RFRA protect the right of the individual to "exercise" his or her religious beliefs free from government interference. U.S. Const. amend. I; 42 U.S.C. § 2000bb-1(a). Religious liberty protects the individual's "right to express [one's] beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring). "The 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" *Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 877 (1990). The decisions below contradict the Court's prior decisions concerning religious liberty, and the impact of these decisions—and, as importantly, their analyses—if upheld, could jeopardize the religious exercise of tens of millions of Americans.

These decisions should be reversed for two principal reasons. *First*, the decisions conflict with this Court's substantial burden precedent. The courts below applied a flawed test to evaluate whether the Affordable Care Act (ACA), 42 U.S.C. § 300gg-13, as implemented by HHS, imposes a substantial burden on Petitioners' religious exercise. The courts appeared to afford exceptional deference to the regulations at issue because they are styled an "accommodation." HHS regulations enacted under the ACA require that some

group health plans provide coverage for all FDA-approved contraceptive methods and sterilization procedures without cost sharing. Nearly two years after issuing the contraceptive mandate, HHS adopted regulations that purport to provide an "accommodation" allowing certain religious organizations that object to the provision of such contraceptives to "comply" with the mandate by other means. 78 Fed. Reg. 39,870 (July 2, 2013). Importantly, with the "accommodation," HHS continued to deny many religious organizations the genuine exemption that the mandate provided to a narrow subset of religious employers. Petitioners object, on undisputedly sincerely held religious grounds, to providing health insurance that offers certain of these contraceptives *and* to taking the actions required to avail themselves of the "accommodation," believing that each option makes them morally complicit in the provision of contraceptives in contravention of their religious beliefs.

The courts below erroneously evaluated the accommodation differently from a direct regulation in three ways. First, they evaluated the burden of the accommodation *in relation to* the contraceptive mandate, as opposed to evaluating the burden of the accommodation *in its own right*. Second, the courts below unduly minimized Petitioners' participation in the accommodation scheme, focusing instead on the activity of third parties after Petitioners submit the accommodation forms. In characterizing Petitioners' religious objections as an attempt to assert control over a third party's action, instead of an objection to the actions Petitioners themselves must take in violation of their religious beliefs, these courts relied on inapt decisions as a basis for holding that the accommodation did not substantially burden Petitioners' religious beliefs. Third, the Tenth

Circuit placed undue weight on the fact that the accommodation allegedly was intended to "reconcile religious liberty with the rule of law" and "to permit the religious objector both to avoid a religious burden and to comply with the law," *LSP* Pet. App. 73a-74a, thus supplanting the heightened scrutiny required by RFRA with a less rigorous (and unprecedented) standard.

The lower courts, while purportedly evaluating whether the challenged regulations impose a substantial burden on Petitioners' religious beliefs, in fact analyzed Petitioners' religious reasoning and the correctness of their belief that acting pursuant to the HHS regulatory "accommodation" scheme would make them morally complicit in the provision of contraceptives—as if courts have any competence to evaluate moral complicity. For example, the Tenth Circuit ruled that Petitioners, by taking advantage of the accommodation scheme, would not be morally complicit in the provision of contraceptives (*see, e.g.*, *LSP* Pet. App. 46a-47a & n.20).

This Court's decisions expressly disclaim any judicial role in making such evaluations, either under the First Amendment or RFRA. "[I]t is not within the judicial function and judicial competence to inquire whether" someone who has religious qualms with a law has "correctly perceived the commands of [his] ... faith." *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981). Rather, the Court's decisions confine judicial review of whether an adherent's religious beliefs prohibit compliance with government regulation to the "'narrow function'" of inquiring whether those beliefs "reflect[] 'an honest conviction.'" *Hobby Lobby*, 134 S. Ct. at 2779. In other words, the adherent alone defines the tenets of his or her religious observance; there is no proper role for court review of the reasoning underlying a sincerely held religious belief. Even religious

reasoning or beliefs that some reasonable observers would view as implausible are entitled to protection if sincerely held. *Id.* at 2778 ("'Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim[.]'" (quoting *Smith*, 494 U.S. at 887).

Once a court determines that a party sincerely believes, reasonably or not, that taking the action the government requires or failing to take the action that the government forbids is contrary to his or her religious beliefs, the only burden question for the court is whether a substantial governmental sanction attaches to disobedience of the law. If so, the substantial burden inquiry is at an end.

The circuit courts improperly inquired into the validity of Petitioners' belief under the guise of a substantial burden analysis. In effect, the courts inquired into whether Petitioners' *belief* is reasonable, rather than whether *the burden placed on that belief* is substantial. In so doing, the court moved from the role of legal arbiter to that of moral philosopher, and thus moved from a role of constitutional necessity to one of constitutional incompetence. This was improper. It is not for the court "to say that the [religious] line" Petitioners drew "was an unreasonable one." *Thomas*, 450 U.S. at 715.

The lower courts' substantial burden analyses also improperly focused on the allegedly incidental administrative burden of participating in the accommodation scheme, in violation of Petitioners' beliefs. Rather than evaluate the substantial financial penalties the government placed on Petitioners' *adherence* to their religious belief, the courts instead measured the ease with which Petitioners could *violate* that belief by participating in the accommodation scheme. This is not the in-

quiry RFRA requires. To the contrary, "the question that RFRA presents" is whether the challenged government action "imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2778 (emphasis omitted).

Second, the lower courts' flawed interpretation of RFRA will have far-reaching adverse consequences on religious liberty if upheld. It is critical that this Court affirm that "accommodations" must be evaluated the same way as other laws challenged under RFRA, using the *correct* substantial burden test. If allowed to stand, the modified substantial burden analysis employed by the circuit courts could incentivize regulators to add "accommodations" that do not actually accommodate the exercise of sincerely held religious beliefs. This country has a longstanding tradition of providing robust religious exemptions. *Infra* Part II.B. Accommodations-in-name-only would undermine the important interests in protecting religious liberty that have been recognized by Congress and this Court.

ARGUMENT

I. The Decisions Of The Circuit Courts Below Conflict With This Court's Substantial Burden Precedent

A. The Lower Courts Unduly Deferred To HHS's Characterization Of The Relevant Provision As An "Accommodation"

Substantial burden on a party's religious exercise is evaluated on the basis of the party's own sincerely held religious belief. *E.g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014). This Court has repeatedly stated that "it is not for us to say" whether a

party's religious beliefs "are mistaken or insubstantial." *Id.* at 2779. When a party determines that certain conduct violates its religious beliefs, a court's "'narrow function ... is to determine' whether the line drawn 'reflects an honest conviction.'" *Id.*

Under the ACA, HHS promulgated regulations requiring group health plans and health insurance issuers to provide "preventive care and screenings" relating to women's health. 45 C.F.R. § 147.130(a)(1)(iv). The HHS also issued guidelines requiring employers to provide "coverage, without cost sharing, for '[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.'" 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012); *see* 29 C.F.R. § 2590.715-2713(a). Any employer who fails to comply with this contraceptive mandate faces stiff penalties. 26 U.S.C. §§ 4980D(b), 4980H(a), (c). The regulations exempt a narrow group of churches and closely related organizations, but religious nonprofit organizations like Petitioners do not qualify for the exemption. 45 C.F.R. § 147.131(a).

The regulations provide an alternative way to comply with the contraceptive mandate, called an "accommodation," for organizations like Petitioners. 78 Fed. Reg. 39,870, 39,871-39,872 (July 2, 2013); 29 C.F.R. § 2590.715-2713A. To comply with the accommodation requirement, an organization must certify using one of two methods. The first method is for the objector to submit an EBSA Form 700 Certification directly to its third-party administrator (TPA), certifying that it is a religious nonprofit entity that religiously objects to providing abortifacient or contraceptive care required by the contraceptive mandate. 29 C.F.R. § 2590.715-2713A(a)-(b). The second method is for the objecting

organization to submit notice to HHS, providing the organization's name, its religious objections to complying with the mandate, and, importantly, providing its insurance plan name and type and its TPA's name and contact information. 79 Fed. Reg. 51,092, 51,094-51,095 (Aug. 27, 2014); 80 Fed. Reg. 41,318, 41,323 (July 14, 2015); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B). The objecting organization must also keep its notice to HHS current, in case any required information changes. 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B). Petitioners religiously object to complying with either method of "accommodation."

Petitioners genuinely believe that utilizing the "accommodation" provided by HHS would make them complicit in sin, give the appearance of involvement in sin (itself a sin), and grievously impair their ability to bear witness to the sanctity of human life. That HHS has seen fit to label this procedure an "accommodation" changes nothing. Nowhere in this Court's prior decisions does the "'narrow function'" of judicial review of religious convictions widen based on whether a party's conviction relates to a law of general applicability or to a regulation that an agency has labelled an "accommodation." *See Hobby Lobby*, 134 S. Ct. at 2779.

Nevertheless, the courts below evaluated the accommodation differently from a direct regulation in three ways that were error. First, they evaluated the burden of the accommodation *in relation to* the contraceptive mandate, as opposed to evaluating the burden of the accommodation in its own right. For example, the Tenth Circuit stated, without citing any authority, "[w]hen, as here, plaintiffs are offered an accommodation to a law or policy that would otherwise constitute a substantial burden, we must analyze whether the accommodation renders the potential burden on religious

exercise insubstantial or nonexistent such that the law or policy that includes the accommodation satisfies RFRA." *LSP* Pet. App. 57a. The court then concluded that the accommodation "eliminates burdens Plaintiffs otherwise would face" *(id.* at 60a), and that the "opt out ... relieves objectors of their coverage responsibility" *(id.* at 68a)—all to demonstrate that the religious violation that results from the HHS regulations is supposedly *less severe* under the accommodation than by compliance with the contraceptive mandate itself.

But whether complying with the accommodation is *less objectionable* than the contraceptive mandate (which, for some religious adherents, it is not) is not the correct test of substantial burden. Rather, the question is whether the government imposes a substantial burden *on* Petitioners if participating in the supposed accommodation violates their religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2778-2779; *see also Sharpe Holdings, Inc.* v. *U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 937 (8th Cir. 2015) ("Here, the substantial burden imposed by the government on [plaintiffs'] exercise of religion is the imposition of significant monetary penalties should [plaintiffs] adhere to their religious beliefs and refuse to comply with the contraceptive mandate *or the accommodation regulations*. This burden mirrors the substantial burden recognized by the Supreme Court in *Hobby Lobby*." (emphasis added)).[2]

---

[2] The dissent from the Tenth Circuit's denial of rehearing en banc characterized the panel majority's error slightly differently. *Little Sisters of the Poor Home for the Aged* v. *Burwell*, 799 F.3d 1315, 1317 (10th Cir. 2015) (Hartz, J., dissenting from denial of rehearing *en banc*). Judge Hartz, writing for the five dissenting judges, stated that the panel majority had reframed Petitioners' belief, "generaliz[ing]" the belief to be only opposition to facilitating the use and delivery of contraceptive and abortifacient care,

Second, the courts below unduly minimized Petitioners' required participation in the accommodation scheme, focusing excessively on the activity of others rather than on the burden placed on Petitioners by being required to submit the accommodation form. These courts misapplied this Court's precedents by characterizing Petitioners' religious objections as an attempt to assert control over a third party's action, namely, the ensuing acts of the government, insurers, and third-party administrators. *See* ETBU Pet. App. 15a-18a; Geneva Pet. App. 37a-41a; PFL Pet. App. 34-39. Each of these courts cited the D.C. Circuit's decision in *Kaemmerling* v. *Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008), as supposedly extending this Court's free exercise jurisprudence regarding conduct undertaken by third parties. But—in addition to not being binding on this Court—*Kaemmerling* is inapposite. In *Kaemmerling*, a prisoner objected to DNA analysis of his body tissue, but explicitly disclaimed any religious objection to the drawing of blood or taking of bodily tissue from his person. 553 F.3d at 678-679 ("It is not penetrating the body or collecting bodily material that Kaemmerling alleges violates his beliefs but rather collecting the

---

such that, in the majority's view, Petitioners have "no *religious* objection to executing the forms; it is just that executing the forms burdens their religious opposition to certain contraceptives." *Id.* (emphasis in original). The dissenters from rehearing thus characterized the Tenth Circuit panel majority's error as reframing (and diminishing) Petitioners' religious beliefs. Amici instead view the error as moving the substantial burden goalposts by unduly deferring to the challenged regulation's label as an "accommodation," such that Petitioners' sincere religious objections cannot overcome an accommodation that purportedly alleviates the severity of the sinful conduct required by the mandate from which the accommodation provides some relief. In any event, whether the error was reframing the required burden showing or reframing Petitioners' religious beliefs, the Tenth Circuit majority erred.

'building block of life' specifically."). The D.C. Circuit emphasized that the plaintiff's only objection was to the derivation of his DNA information from any fluid or tissue sample already in the government's possession—"even collecting DNA information from hair and skin that he naturally shed onto his clothes then turned over to prison officials for washing." *Id.* at 678. Accordingly, the D.C. Circuit in *Kaemmerling* ruled that the plaintiff may not be heard to object to the action of third parties unconnected to his own action. *See id.*

By contrast, in this appeal Petitioners object to the activity in which the regulations mandate that *they participate*: filling out the accommodation forms. This is not an objection to the actions of third parties. Of course, as the Third Circuit points out (Geneva Pet. App. 38a), what follows after submitting the accommodation forms informs Petitioners' moral assessment of the significance of the action of filling out the forms. But this does not change the fact that Petitioners are required to participate themselves in filling out the forms, an act that violates their religious beliefs.[3] A more apt comparison to this appeal would be if the plaintiff in *Kaemmerling* had religiously objected to willing participation in a blood draw—a situation the D.C. Circuit in *Kaemmerling* took pains to explain was not the case. *See* 553 F.3d at 678-679. Accordingly, the lower courts' reliance on *Kaemmerling*, as supposedly extending this Court's free exercise jurisprudence (as

---

[3] That an action derives its moral significance or lack of significance from what occurs afterwards is unsurprising. Many actions are like this—for example, a playful shove can be harmless horseplay between friends, but the same action can amount to homicide if next to a street when a car is passing. The Third Circuit's critique that Petitioners' "real objection is to what happens after the form is provided" is therefore misplaced. *Geneva* Pet. App. 38a.

stated in *Bowen* v. *Roy*, 476 U.S. 693, 696 (1986) and *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441-442 (1988)) to control the facts of this appeal, is misplaced. *See ETBU* Pet. App. 15a-19a & n.35-36; *Geneva* Pet. App. 37a-41a; *PFL* Pet. App. 37-38.

The circuit courts' reliance on this Court's decisions in *Bowen* and *Lyng* is misplaced for the same reason that *Kaemmerling* is inapposite to the facts of this case. In *Bowen*, a Native American plaintiff objected to the government's use of his daughter's social security number to process welfare benefits requests, on the grounds that it would "rob the spirit" of his daughter. 476 U.S. at 695-96, 700 (rejecting plaintiff's argument as an attempt to "dictate the conduct of the Government's internal procedures.").[4] Similarly in *Lyng*, the objected-to conduct was the government harvesting timber on publicly-owned land (land that Native Americans also used for religious purposes). 485 U.S. at 441-442, 449-451. Unlike in those cases, Petitioners do not seek a "religious veto" (Geneva Pet. App. 38a (internal citation omitted)) over the actions of others wholly unconnected to Petitioners' own conduct.

---

[4] The plaintiff in *Bowen* also objected to the requirement that he furnish his daughter's social security number, and the Court highlighted the distinction between "individual and governmental conduct." 476 U.S. at 701 n.6. Although Chief Justice Burger concluded, in a part of his opinion only joined by two Justices, that the plaintiff's religion was not unconstitutionally burdened by being required to furnish the number, he applied reasoning later rejected by Congress in the passage of RFRA. *See, e.g., id.* at 707. Moreover, five Justices disagreed with this reasoning and would have ruled in favor of the plaintiff on his challenge to furnishing the number, to the extent the claim was not moot. *See id.* at 726-733 (O'Connor, J., concurring in part and dissenting in part, joined by Brennan, Marshall, JJ.); *id.* at 733 (White, J., dissenting); *id.* at 715-716 (Blackmun, J.).

Third, the Tenth Circuit majority placed great weight on the purported fact that the accommodation was designed to "reconcile religious liberty with the rule of law" and "to permit the religious objector both to avoid a religious burden and to comply with the law." *LSP* Pet. App. 73a-74a. The majority thus viewed the accommodation as supplanting RFRA itself. Instead of evaluating the accommodation like any other law, the Tenth Circuit set the accommodation apart, to be evaluated under a new and different standard: whether it "reconciled with religious objections" the "legislative policy choice ... to afford women contraceptive coverage." *Id.* at 75a. In so doing, the majority disregarded a religious objector's right to disobey a religiously objectionable accommodation (*id.* at 72a-74a)—a right upheld by this Court. *See Hobby Lobby*, 134 S. Ct. at 2775-2776. The majority refused to engage in a traditional substantial burden analysis, asserting that Petitioners have no right to "stymie coverage to their employees by breaking the law," but instead stated, if they "wish to avail themselves of a legal means—an accommodation—to be excused from compliance with a law, they cannot rely on the possibility of their violating that very same law to challenge the accommodation." *LSP* Pet. App. 74a. But the accommodation cannot supplant Petitioners' rights under RFRA. This Court held in *Hobby Lobby* that the government cannot force Petitioners to obey a religiously objectionable law, even one styled an "accommodation," to comply with another law to which Petitioners also object; Petitioners may indeed "rely" on "violating" the accommodation in challenging it under RFRA. *Id.*

The courts below cited scant precedent to support treating accommodations differently, and in the case they do cite, *Hobby Lobby*, this Court noted that it was

not deciding whether the accommodation approach complies with RFRA for purposes of all religious claims. 134 S. Ct. at 2782. Although the courts below suggested that the presence of the accommodation relieves Petitioners' religious concerns (*e.g.*, *LSP* Pet. App. 68a-69a), an accommodation is not by definition inoffensive to religious belief or immune from imposing a substantial burden. *See* 42 U.S.C. § 2000bb-3(a) ("This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise[.]"); *United States* v. *Friday*, 525 F.3d 938, 947-948 (10th Cir. 2008) (suggesting that a permit process that purports to accommodate religion could be religiously objectionable and found to be a substantial burden, but claimant did not make this argument); *Beerheide* v. *Suthers*, 286 F.3d 1179, 1186-1187 (10th Cir. 2002) (rejecting non-kosher, vegetarian meals for Orthodox Jewish inmates as an accommodation of kosher diet). Nor is it material that the accommodation is provided by the government as an alternative to another burdensome procedure (providing contraceptive and abortifacient drugs) that also violates Petitioners' religion.

Regardless of whether HHS has provided an alternative "accommodation" procedure—or a dozen alternative procedures, or no alternative at all—all avenues currently provided by HHS to avoid penalty violate Petitioners' sincerely held religious beliefs. As the Eighth Circuit stated in a parallel case, "if one sincerely believes that completing Form 700 or HHS Notice [the accommodation] will result in conscience-violating consequences, what some might consider an otherwise neutral act is a burden too heavy to bear." *Sharpe Holdings*, 801 F.3d at 938, 941.

This Court's precedents neither require more of a showing by Petitioners nor allow more analysis by the

courts concerning the inconsistency of the law with Petitioners' conscience. *See Hobby Lobby*, 134 S. Ct. at 2778-2779; *Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 887 (1990); *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989); *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981). To the contrary, this Court's precedents establish that it is for the party alone to define the tenets of its religious observance. *Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

B. The Circuit Courts Below Misconstrued The Substantial Burden Test

The lower courts misapplied the precedent established by this Court's decisions for analyzing claims under RFRA and misconstrued the substantial burden test. First, the courts improperly evaluated the reasonableness of Petitioners' belief that participating in the accommodation scheme would violate their religion. Second, instead of evaluating whether the government imposed a substantial burden on Petitioners' adherence to their beliefs, the courts focused on the incidental administrative burden of participating in the accommodation scheme in violation of those beliefs.

1. The circuit courts impermissibly questioned the reasonableness of Petitioners' religious beliefs

As the Court has repeatedly made clear, the reasonableness or truth of religious belief is beyond the competence and purview of the courts. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2778 ("'Repeatedly and in many dif-

ferent contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim.'" (citations omitted)); *Hernandez*, 490 U.S. at 699 ("It is not within the judicial ken to question ... the validity of particular litigants' interpretations of [their] creeds.").

Similarly, it is not for the courts to engage in "difficult and important question[s] of ... moral philosophy," including "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 134 S. Ct. at 2778. Where a religious objector believes that performing an act will violate his or her religious beliefs, and that belief is sincerely held, courts must accept the objector's belief. *Id.*; *see also Sharpe Holdings*, 801 F.3d at 942 ("The question here is ... whether [Petitioners] have a sincere religious belief that their participation in the accommodation process makes them morally and spiritually complicit in providing abortifacient coverage. Their affirmative answer to that question is not for us to dispute.") The sincerity of Petitioners' belief that participating in the accommodation scheme would violate their religion is not in dispute.[5]

The Court's most recent RFRA decision, *Hobby Lobby*, is illustrative. Faced with the government's argument "that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception ...) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated," the Court explained that "courts have no business addressing whether the

---

[5] *See* LSP Pet. App. 16a-17a, 58a; ETBU Pet. App. 9a; Geneva Pet. App. 30a; PFL Pet. App. 28.

religious belief asserted in a RFRA case is reasonable." 134 S. Ct. at 2777-2778. The petitioners, the Court explained, believed that complying with the contraceptive mandate "is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them" to comply. *Id.* at 2778. The Court did not analyze whether the contraceptive mandate was *in fact* connected to the destruction of an embryo; rather, it noted that that determination was not for courts to make. *Id.* (quoting *Thomas*, 450 U.S. at 715).

Despite paying lip service to these long-settled principles (*see, e.g.*, *LSP* Pet. App. 53a ("[C]ourts do not question 'whether the petitioner ... correctly perceived the commands of [his or her] faith.'" (citation omitted)); *PFL* Pet. App. 28 ("Plaintiffs are correct that they—and not this Court—determine what religious observance their faith commands.")), the circuit courts' substantial burden analysis set about doing exactly what the courts were precluded from doing: evaluating whether *in fact* participating in the accommodation scheme would violate Petitioners' religious beliefs. Faced with Petitioners' assertion that participating in the accommodation violated their religious beliefs by making them complicit in a grave wrong, the circuit courts framed their substantial burden inquiry as whether participating in the accommodation scheme in fact "triggered," "caused," or made Petitioners "complicit" in the grave moral wrong—*i.e.*, the provision of contraceptive and abortifacient coverage. *See Geneva* Pet. App. 30a ("[W]e must nonetheless objectively assess whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage."); *PFL* Pet. App. 29 ("'[A]lthough we acknowledge that the [plaintiffs] believe that the regu-

latory framework makes them complicit in the provision of contraception, we will independently determine what the regulatory provisions require.'" (citation omitted)); *see also LSP* Pet. App. 58a-60a; *ETBU* Pet. App. 18a-19a. Finding that Petitioners' participation in the accommodation scheme did not *legally* "trigger," "cause," or make Petitioners "complicit" in the provision of contraception and abortifacients coverage, the circuit courts concluded that Petitioners' religious beliefs were not substantially burdened. *See LSP* Pet. App. 58a-92a; *ETBU* Pet. App. 19a-25a; Geneva Pet. App. 34a-37a; *PFL* Pet. App. 34-49.

Setting aside the fact that *legal* causation is a distinct concept from "causation" or "complicity" as a species of moral theology, *cf. University of Notre Dame* v. *Sibelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting) ("[W]e are judges, not moral philosophers or theologians; this is not a question of legal causation but of religious faith."), *vacated by* 135 S. Ct. 1528 (2015), it simply is not for courts to evaluate the truth or logic of Petitioners' religious beliefs, *see Thomas*, 450 U.S. at 714 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit ... protection."). Nor is it for courts to understand—let alone be "convinced," *contra LSP* Pet. App. 58a-59a n.25—why, from the perspective of moral theology, signing a document that Petitioners believe makes them morally complicit in the provision of contraceptives and abortifacients is any different from a simple declaration that Petitioners object to providing contraceptives and abortifacients on religious grounds. *See Thomas*, 450 U.S. at 714 (rejecting lower court's analysis of whether religious objector's beliefs were "consistent"). Petitioners asserted that participating in the accommodation scheme makes them complicit in a

grave wrong that violates their religious beliefs. The circuit courts were required to accept that sincerely held assertion. The circuit courts' refusal to do so, and instead to analyze whether *in fact* the accommodation scheme violated Petitioner's religious beliefs under the guise of determining whether Petitioner's beliefs were substantially burdened, has no basis in the Court's precedent.[6]

2. The circuit courts' analysis improperly focused on the administrative burdens in complying with the accommodation, instead of the significant penalties for refusing to participate in the accommodation scheme in accordance with Petitioners' religious beliefs

Where a law or policy affects religious exercise, the Court has made clear that the RFRA substantial burden analysis focuses on the degree of burden imposed on *adhering* to, and acting in accordance with, religious belief. *See Hobby Lobby*, 134 S. Ct. at 2778 ("[T]he question that RFRA presents" is whether the challenged Government action "imposes a substantial burden on the ability of the objecting parties to conduct business *in accordance* with their religious beliefs." (emphasis added)); *Thomas*, 450 U.S. at 718 (explaining that a burden is substantial to the extent it "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs"); *see also University of Notre Dame*, 786 at 628 n.1 (Flaum, J. dissenting) ("[O]nce we determine a religious belief is burdened, substantiality

---

[6] Petitioners nevertheless have demonstrated that the accommodation does not operate as a simple declaration of opposition to the mandate but as an actual agent of causation that substantially burdens their religious exercise. *See, e.g.*, *ETUB* Pet. Br. 41-46; *Zubik* Pet. Br. 11-14, 36-37.

is measured by the severity of the penalties for noncompliance."). That is, a religious believer's exercise of religion is substantially burdened if the law presents the believer with the choice of either violating their religious beliefs or suffering a substantial penalty. *Hobby Lobby*, 134 S. Ct. at 2779; *see also Holt* v. *Hobbs*, 135 S. Ct. 853, 862 (2015).

For example, in *Hobby Lobby*, the Court held that the respondents' religious exercise was substantially burdened by a law requiring that they pay "an enormous sum of money" in penalties for adhering to religious beliefs prohibiting the provision of contraceptives and abortifacients. *See* 134 S. Ct. at 2779. Similarly, in *Wisconsin* v. *Yoder*, one of the Court's cases Congress enacted RFRA to restore, 42 U.S.C. § 2000bb(b)(1), the Court held that the respondent's religious exercise was substantially burdened by the imposition of criminal sanctions for adhering to religious beliefs prohibiting the enrollment of children in secondary school. 406 U.S. 205, 218 (1972).

Here, Petitioners face a similar choice: participate in the accommodation scheme in violation of their religious beliefs, or encounter admittedly "draconian" penalties. *ETBU* Pet. App. 5a. Rather than apply this Court's directly applicable substantial burden precedent by evaluating the substantial financial penalties the government placed on Petitioners' *adherence* to their religious belief, the courts instead measured the ease with which Petitioners could *violate* that belief by participating in the accommodation scheme. For example, the Tenth Circuit repeatedly asserted that completing the paperwork necessary for participating in the accommodation scheme did not burden Petitioners' exercise of religion. *See, e.g.*, *LSP* Pet. App. 48a ("[T]hese *de minimis* administrative tasks do not sub-

stantially burden religious exercise for the purposes of RFRA."); *id.* at 94a ("[T]his ministerial act to opt out is not a substantial burden on religious exercise."). And the analysis of the other circuit courts was no different. *See ETBU* Pet. App. 17a-25a (analyzing whether complying with accommodation imposed a substantial burden); *Geneva* Pet. App. 34a-37a (same); *PFL* Pet. App. 48 ("The regulatory requirement that they use a sheet of paper to signal their wish to opt out is not a burden that any precedent allows us to characterize as substantial.").

This is not the inquiry RFRA requires. Nowhere did the circuit courts analyze the degree to which Petitioners' *adherence* to their religious beliefs by *not* participating in the accommodation scheme (or otherwise providing coverage for contraceptive and abortifacient coverage) would expose Petitioners to draconian penalties. It was that analysis which the Court's precedent compels and which the circuit courts failed to undertake.

II. The Circuit Courts' Flawed Interpretation Of RFRA Will Have Sweeping, Detrimental Consequences For Religious Liberty If Upheld

A. The Lower Courts' Substantial Burden Analysis Would Allow Courts To Override Any Sincerely Held Belief

Courts have consistently refrained from evaluating the merits and validity of sincerely held religious beliefs, finding in a variety of contexts that the federal judiciary has "no business" addressing this question. *Hobby Lobby*, 134 S. Ct. at 2778; *see also Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *Thomas*, 450 U.S.

at 716 (courts do not question "whether the petitioner ... correctly perceived the commands of [his or her] faith"). This judicial restraint is particularly important with regard to review of regulatory schemes and their effects on religious beliefs, since "many people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of 'police' or 'health' regulations reflecting the majority's view." *Sherbert* v. *Verner*, 374 U.S. 398, 411 (1963) (Douglas, J., concurring). A valid challenge to laws or regulations on religious freedom grounds must be founded on a proper motivation, but courts interpret authentic religious beliefs and practices broadly. *E.g.*, *Hobby Lobby*, 134 S. Ct. at 2770 ("Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within [the] definition" of "exercise of religion"); *Smith*, 494 U.S. at 877 ("The 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'"); *Holt*, 135 S. Ct. at 860 ("Congress defined 'religious exercise' capaciously" and "mandated that this concept 'shall be construed in favor of a broad protection of religious exercise.'").

When a plaintiff is motivated by a sincere religious belief, the substance of the belief and its centrality to the religion in question become irrelevant. Sincerity of belief does not require that the belief be deeply-held, central to a particular religion, or a core religious principle to "qualify" for the substantial burden analysis. *See Hobby Lobby*, 134 S. Ct. at 2762 ("Congress ... defined the 'exercise of religion' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" (quoting § 2000cc-5(7)(A))). Establishing a standard of measurement for belief

would create a legal test under which courts could decide which beliefs are "'central' or 'indispensable' to which religions, and by implication which are 'dispensable' or 'peripheral,' and would then decide which government programs are 'compelling' enough to justify 'infringement of those practices.'" *Lyng*, 485 U.S. at 457 (rejecting the "prospect of this Court holding that some sincerely held religious beliefs and practices are not 'central' to certain religions, despite protestations to the contrary from the religious objectors..."). Such an approach would place a court in the unique position of deference to the strength of a belief only when that belief is deemed to be uncontroverted. Religious belief cannot be judicially measured by how closely it follows any particular creed or religious practice. On the contrary, a valid belief may not comport precisely with tenets of the adherent's particular faith, as understood by others, and yet it may still be sincere. *E.g.*, *Nelson* v. *Miller*, 570 F.3d 868, 879 (7th Cir. 2009) (holding that an individual is not required to prove that his or her religion "compelled the practice in question and to verify that compelled practice with documentation."). Because of the very nature of religious belief and faith, any judicial evaluation of "centrality" is, by definition, unsustainable.

Substantial burden analysis likewise does not include an evaluation of different "levels" of belief or a determination of which beliefs constitute the end religious practice and which are merely a means to that end. In these challenges to the HHS contraceptive mandate, the circuit courts appear to have done the latter. *See, e.g.*, *LSP* Pet. App. 17a ("Although we recognize and respect the sincerity of Plaintiff's beliefs and arguments, we conclude that the accommodation scheme relieves Plaintiffs of their obligations under the Mandate

and does not substantially burden their religious exercise[.]"); *ETBU* Pet. App. 13a n.33 ("Although [plaintiff] is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces [plaintiff] to act in a way that would violate those beliefs." (citation omitted)). Petitioners sincerely believe that the regulatory scheme, including the purported accommodation provision, require them to engage in actions that violate their beliefs. *E.g.*, *LSP* Pet. App. 35a-37a; *Geneva* Pet. App. 29a-30a; *ETBU* Pet. App. 9a; *PFL* Pet. App. 16, 20. Further evaluation is beyond the province of the judiciary. The specific elements of the belief that are burdened by the regulation or accommodation should not intrude upon the analysis.

A court cannot pick and choose the beliefs against which the substantial burden will be evaluated. It cannot create a hierarchy of beliefs and then apply the substantial burden test only to some levels of belief. *E.g.*, *Lyng*, 485 U.S. at 457 ("We would accordingly be required to weigh the value of every religious belief and practice that is said to be threatened by any government program"); *Holt*, 135 S. Ct. at 862 (the "'substantial burden' inquiry asks whether the government has substantially burdened religious exercise not whether the [individual] is able to engage in other forms of religious exercise"). And a court cannot define the universe or scope of the beliefs to which the substantial burden test will be applied. To do so is to define judicially the faith and the beliefs themselves, not to apply the substantial burden test as a matter of law to the beliefs as articulated and established by the individual who holds them.

Once a court has determined that an individual's religious belief is sincere—a point that neither courts nor the government have questioned in relation to Peti-

tioners' beliefs—the next step is a determination whether the relevant regulation burdens religious exercise in conformity with that belief, not a further evaluation of the belief itself. *Hobby Lobby*, 134 S. Ct. at 2779 ("[O]ur 'narrow function ... in this context,'" therefore, "'is to determine' whether the line drawn reflects 'an honest conviction.'" (quoting *Thomas*, 450 U.S. at 716)). Courts simply do not have the authority or competence to parse religious belief as part of a substantial burden analysis. An individual's assertion that a regulation violates their religious belief, if that belief is deemed sincere, cannot be subject to further subdivision for the purpose of evaluating the burden that may be placed on component pieces of the belief. The approach that the lower courts adopted in evaluating the burden on Petitioners in this case invites just such a forbidden judicial inquiry into religious beliefs. Although the courts below found Petitioners' beliefs sincere, they held that the accommodation "relieves Plaintiffs of their obligation" and would therefore not violate their religious beliefs. *LSP* Pet. App. 17a; *see also* Geneva Pet. App. 39a ("[W]e cannot agree with the appellees' characterization of the effect of submitting the form as triggering, facilitating, or making them complicit in the provision of contraceptive coverage."); ETBU Pet. App. 9a, 28a ("The sincerity of [plaintiffs'] beliefs is undisputed," but "the acts *the plaintiffs* are required to perform do not involve providing or facilitating access to contraceptives."); PFL Pet. App. 28 ("Plaintiffs' objection rests on their religious belief that 'they may not provide, pay for, and/or facilitate access to contraception, sterilization, abortion, or related counseling[.]' But the regulations do not compel them to do any of those things.").

This method of analysis encourages courts to consider the moral reasoning underlying religious beliefs, rather than the depth of the burden that the regulation would impose—an approach that intrudes into previously inviolable matters of faith. Applied to recent cases involving free exercise—where the burdened religious belief was unquestioned—the resulting modified assessment could lead to a different outcome. *E.g.*, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425 (2006) ("receiving communion through hoasca," a sacramental tea and a Schedule I controlled substance, was "[c]entral to the [religion's] faith"); *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 524 (1993) (finding, without inquiry, that "one of the principal forms of devotion [in the Santeria religion] is an animal sacrifice").

In contrast to the reasoning below, the relevant inquiry for a substantial burden analysis is the substantiality of the *penalty* for refusing to abide by the regulation, not the substantiality of the specific act that a regulation mandates or proscribes. *See Hobby Lobby*, 134 S. Ct. at 2775-2776. If judicial deliberation addresses the act, which may seem objectively minimal, courts will increasingly be placed in a position of estimating the burden imposed solely by compliance with the regulation itself, rather than the consequence of adherence to religious beliefs in contravention of the regulation. Such analysis ignores the impossible choice that burdensome regulations present—one must violate his or her religious beliefs or be subject to potentially severe penalties. *See Holt*, 135 S. Ct. at 862. Moreover, the step between assessing the burden on religious belief due to compliance with the regulatory requirement, and a deeper focus on the religious belief itself, is a short one—as this case demonstrates.

Thus, continued judicial application of a substantial burden analysis that focuses on the regulatory action required, or prohibited, rather than focusing on the consequences when adherents act according to their beliefs and contrary to the regulation, is both flawed and dangerous. Such an approach opens the door for an inquiry that this Court has consistently rejected. *E.g.*, *Hobby Lobby*, 134 S. Ct. at 2778 ("Arrogating the authority to provide a binding national answer to this religious and philosophical question, [the government] in effect tell[s] the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step."); *Smith*, 494 U.S. at 887. In determining whether a substantial burden exists, courts could use the reasoning of the courts below to question any and all sincerely held beliefs, potentially "rul[ing] that some religious adherents misunderstand their own religious beliefs." *Lyng*, 485 U.S. at 458.

Sincere religious belief and practice must be free from judicial definition, as it should be free from definition by other branches of government. Otherwise, the government would assume a role in determining permissible religious exercise that has long been expressly forbidden. Once the courts below determined that Petitioners sincerely believed that their compliance with the regulation violated their religious beliefs—an issue not disputed—the courts erred in undertaking further evaluation of Petitioners' beliefs.

B. The Decisions Below, If Upheld, Could Incentivize Regulators To Utilize "Accommodations" To Avoid RFRA's Requirement That Government Respect Religious Liberty

Because the lower courts misconstrued the applicable test under RFRA, resulting in their holding that

the "accommodation" did not substantially burden Petitioners, the Court should reverse these decisions and hold that a religious accommodation is subject to the same heightened standard of review as any law challenged under RFRA. Otherwise, the decisions could incentivize regulators and other government actors to create similar religious "accommodations" that do not accomplish RFRA's goal of preserving religious liberty.

A religious believer's ability to act in accordance with his or her religious beliefs is of utmost importance. Indeed, "[f]ree exercise ... implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring) (citation omitted); *Smith*, 494 U.S. at 877 ("The 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'"). Religious exemptions are critical to protecting that right. This country has had a tradition of providing religious exemptions dating back to early America when certain religious objectors, predominantly Quakers, were exempted from taking oaths, serving in the military, and removing their hats in court. *See* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466-1473 (1990). Since *Roe* v. *Wade* was decided in 1973, Congress has passed numerous laws granting exemptions to those who object to abortion on the basis of a religious belief, such as the Church Amendment, which protects hospitals receiving federal funds from forced participation in abortion or sterilization. 42 U.S.C. § 300a-7. Responding to the Supreme Court's decision in *Smith*, Congress enacted

RFRA, recognizing "free exercise of religion as an unalienable right" and affirming its conviction that "governments should not substantially burden religious exercise without compelling justification." *Id.* § 2000bb(a)(1), (3). Thus, exemptions for religious reasons are an indelible part of this country's tradition of protecting religious liberty.

Ignoring this tradition of exemptions for religious liberty, HHS chose to create a so-called "accommodation" that is not in fact an accommodation, but an alternative way to "comply" with the mandate. 79 Fed. Reg. at 51,092; 78 Fed. Reg. at 39,870. The lower courts' flawed analyses of this purported "accommodation" under RFRA has led to the incorrect conclusion by several courts that the "accommodation" adequately protects Petitioners' religious liberty, when in fact, it does not. Petitioners sincerely believe that, under the accommodation scheme, they are morally complicit in the provision of contraceptive coverage, which violates their religious beliefs. The reasoning of the lower courts seems based, in part, on the regulation's self-designation as an accommodation. Without full and appropriate consideration of an accommodation's substantial burden, a person with strong adherence to his or her beliefs is left with the same false choice as the direct regulation provides. The mandate's so-called "accommodation," therefore, has the perverse effect of curbing religious liberty.

If the lower courts' incorrect analysis of the test applicable to the "accommodation" at issue here were upheld, regulators and other government actors could be incentivized to devise similarly inadequate "accommodations" to avoid RFRA's strict scrutiny. Government regulators could burden religious practice with little fear of being successfully challenged in court.

This Court has held that the government does not avoid substantially burdening an individual's religious exercise merely by offering the individual alternative accommodations. In *Holt*, a Muslim prisoner challenged the Department of Correction's grooming policy under the Religious Land Use and Institutionalized Persons Act (RLUIPA) on the basis that it "prevent[ed] [him] from growing a [half]-inch beard in accordance with his religious beliefs." 135 S. Ct. at 867.[7] The Court held that petitioner "easily satisfied" his obligation to prove that the grooming policy in question substantially burdened his religious exercise, *id.* at 862, and, significantly, found that the district court below erred when it considered whether there were alternative means by which the petitioner could exercise his religion, *id.* at 863. (Petitioner "'had been provided a prayer rug and a list of distributors of Islamic material, he was allowed to correspond with a religious advisor, and was allowed to maintain the required diet and observe religious holidays.'") Instead, "RLUIPA provides greater protection" because its "'substantial burden' inquiry asks whether the government has substantially burdened religious exercise, not whether the RLUIPA clamant is able to engage in other forms of religious exercise." *Id.* And the trial court "committed a similar error in suggesting that the burden on petitioner's religious exercise was slight." *Id.*; *see also* U.S. Amicus Br. 13 n.1, *Holt* v. *Hobbs* (No. 13-6827) (describing trial court's conclusion as "error").

---

[7] RLUIPA requires application of the "same heightened scrutiny standard" as RFRA. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 725 (2005). *Compare* RLUIPA § 3(a), 42 U.S.C. § 2000cc-1(a) (prohibiting rules and laws that "impose a substantial burden on the religious exercise of a person") *and* RFRA § 21(b), 42 U.S.C.A. § 2000bb-1 (prohibiting rules and laws that "substantially burden a person's exercise of religion").

The courts below erred in failing to follow this Court's precedent in *Holt*, and the danger of allowing such decisions to stand is that, when the government's attempts at accommodating religious practices fall short of actually doing what they purport to do—protecting religious freedom—courts will be able to uphold these "accommodations" using this flawed analysis.[8] If this Court upholds the reasoning applied in the courts below, it will embolden regulators and other governmental actors to continue "accommodating" religion in the manner most convenient to them, without regard for the rights of those who must either agree to accept a false choice, or suffer the consequences. The resulting decisions would cripple the intended purpose of RFRA and RLUIPA to protect the rights of adherents to practice their religious beliefs freely.

While a sincere intent to protect religious freedom should be lauded, an "accommodation" similar to the one created by HHS is like a wolf in sheep's clothing. The holdings in the courts below, as they stand, would establish a precedent detrimental to religious liberty by altering the demanding substantial burden test and undermining the purpose of RFRA (and RLUIPA), which is to "ensure that interests in religious freedom are protected." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring).

---

[8] In contrast, relying on *Holt*, several courts have heard and sustained several challenges regarding state and federal prison religious "accommodations" that fail to accommodate inmates' religious beliefs. *See, e.g.*, *Schlemm* v. *Wall*, 784 F.3d 362 (7th Cir. 2015); *Cole* v. *Danberg*, No. 10-088-GMS, 2015 WL 5437083 (D. Del. Sept. 14, 2015); *Snodgrass* v. *Robinson*, No. 7:14CV00269, 2015 WL 4743986 (W.D. Va. Aug. 10, 2015); *LaPlante* v. *Massachusetts Dep't of Corr.*, 89 F. Supp. 3d 235 (D. Mass. 2015).

CONCLUSION

Each of the judgments of the circuit courts should be reversed.

Respectfully submitted.

ROBERT K. SMITH
MICHAEL A. GREENE
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

ELLIOT SHACKELFORD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

KIMBERLEE WOOD COLBY
CHRISTIAN LEGAL SOCIETY
8001 Braddock Rd., Ste. 302
Springfield, VA 22151

MATTHEW T. MARTENS
Counsel of Record
REGINALD J. BROWN
ASHLEY E. BASHUR
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
matthew.martens@
wilmerhale.com

JANUARY 2016